

HOCK THAI FINANCE CORPORATION BERHAD

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v.

LEE PHET BOON

HIGH COURT SABAH & SARAWAK, KUCHING
DATO HJ. ABDUL KADIR BIN SULAIMAN J.
[ORIGINATING SUMMONS NO. MR.46 OF 1987]
2 AUGUST 1994

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PRACTICE & PROCEDURE: *Sections 150 & 151 NLC - Application by plaintiff for payment out of proceeds of sale and vesting of title to land to successful bidder - Defendant's originating motion to set aside order for sale pending - Defendant's application for stay of plaintiff's application pending disposal of originating motion granted - Defendant's originating motion dismissed - Appeal pending - Preliminary objection to plaintiff's application - Contention that order of stay until the determination of the originating motion meant the final determination - Whether the Court had jurisdiction to hear plaintiff's application - Defendant's application for declaration that the auction sale was null and void being ultra vires the NLC dismissed - Appeal pending - Contention that Court sub judice since both defendant's applications involved issues pertaining to the present application - Whether any merit to defendant's objections - Section 73 Courts of Judicature Act 1964, s.57 Supreme Court Rules 1980.*

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PRACTICE & PROCEDURE: *Application by defendant for stay of execution of present decision pending appeal - Whether any special circumstances to justify stay - Whether Court sub judice.*

The plaintiff obtained a Court order dated 14 March 1988 to sell the defendant's property, charged to the plaintiff, by public auction. The said property was subsequently sold at a reduced reserve price of RM135,000 and the proceeds of sale was deposited into Court. The plaintiff by summons in chambers (SIC) applied for payment out of the proceeds of sale and for vesting of the title in favour of the purchaser. Prior to the SIC being heard the defendant had filed an originating motion (OM) to set aside the sale and when the plaintiff's SIC came up before the Court on 2 March 1994, it was stayed upon the application of the defendant pending the disposal of the defendant's OM. The Court dismissed the defendant's OM on 23 April 1994 and the defendant appealed to the Supreme Court.

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On 2 August 1994, the plaintiff's SIC came up again for hearing. The defendant raised an oral preliminary objection to the SIC on the basis that when the Court ordered the SIC be stayed until the determination of the OM, it meant the final determination and since the OM was pending appeal, the Court had no jurisdiction to hear the present SIC unless the stay order had been appealed against or set aside. It was further contended that s.73 of the Courts of Judicature Act 1964 (CJA) relating to stay of execution pending appeal did not apply to the present case as it only applied to the OM. The defendant also objected to the impropriety of the order of the learned Senior Assistant Registrar (SAR) in giving directions for the sale of the defendant's property and the order of the learned Judge in reducing the reserve price.

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The defendant had also instituted another suit against the plaintiff for a declaration that the auction sale was *inter alia* null and void for being *ultra vires* the National Land Code (NLC) which was dismissed by the Court and was pending appeal. Counsel for the defendant insisted that since the OM and the suit involved issues pertaining directly to the present application which were at various stages of appeal, it was *sub judice* for the Court to hear the application.

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a After delivery of the decision in chambers the Counsel for the defendant applied for a stay of execution of the present decision pending appeal on the ground that if stay was not granted irreparable damage would be caused to the defendant and his family. It was also contended that the matter was *sub judice* pending the two appeals mentioned above. The defendant's application was strenuously objected to by the plaintiff on the ground that there was no special circumstances to justify a stay.

b **Held:**

[1] The order of 2 March 1994 staying this present application was spent once the order in the OM was made on 23 April 1994. The word 'determination' contained in the said order was not meant to convey the meaning of final determination by a higher Court of appeal as the stay given was only pending the disposal of the OM. On this ground the defendant's preliminary objection was overruled.

c **[2]** The objections of the defendant in relation to the orders of the learned SAR and the Judge had been dealt with in the OM and there was no justification for raising them again in this present application in the light that a decision had been made, the matter was pending appeal and no further stay was ordered.

d **[3]** There was no merit to the defendant's claim that the Court was *sub judice* solely for the reason that in both the OM and the suit there were no orders for stay applied for and given. Under s.73 of the CJA an appeal shall not operate as a stay of execution. In the circumstances and pursuant to s.150(3) of the NLC the successful bidder was entitled to have the memorandum of transfer of the said property executed in his favour.

e **[4]** The transfer of the land to the purchaser resulting in the loss of title would cause inconvenience which was common and usual to the defendant and his family. It would not by itself constitute special circumstances to persuade the Court to stay the execution. On the issue of *sub judice*, for the reasons given earlier, the submissions did not appear attractive to the Court and the application for stay was disallowed.

[Plaintiff's application granted with costs, defendant's application for stay disallowed].

f **Case referred to:**
Leong Poh Shee v. Ng Kat Chong [1966] 1 MLJ 86 (*refd*)

Legislation referred to:
Courts of Judicature Act 1964, s. 73
Land Code (Sarawak Cap. 81) ss. 148(2), 150, 151
Rules of the High Court 1980, 0.18 r.19
Supreme Court Rules 1980, r. 57

g *For the plaintiff - Tai Choi Yu; M/s. Tai Choi Yu & Co.*
For the defendant - Vincent Y.H. Lu; M/s. Khoo & Co.

JUDGMENT

h **Haji Abdul Kadir bin Sulaiman J:**
By a Court order dated the 14 March 1988, the defendant's parcel of land together with the building thereon and appurtenances thereof situate at Lorong Sepuloh, Krokop, Miri, containing 461.9 square metres, more or less, and described as Lot 1058 Block 5 Miri Concession Land District charged to the plaintiff, was pursuant to s. 148(2) of the Land Code (Sarawak Cap. 81) (hereinafter referred to as "the Code") ordered to be sold by public auction at a reserve price of RM150,000. When the auction failed to produce

i a buyer the plaintiff applied for another auction to be held at a reduced price of

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RM135,000 and this application of the plaintiff was granted on 9 March 1992. The said land was subsequently sold at the reserved price of RM135,000 to one Lim Chien Ann and the proceeds of sale was deposited in Court

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By this summons in chambers the plaintiff applies *inter alia*, for the payment out of the proceeds of sale and for the vesting of the title to the land in favour of the successful bidder pursuant to ss. 150 and 151 of the Code. Before this summons was heard, the defendant applied by originating motion in MR.9 of 1993 for the order dated 9 March 1992 mentioned above and the consequential order for directions pertaining to the proposed auction sale made by the learned senior assistant registrar be discharged and set aside and/or a declaration that the two orders are *ultra vires* null and void.

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On 1 March 1994, before this summons in chambers of the plaintiff was heard, I heard the originating motion of the defendant. On a preliminary objection by the learned counsel for the plaintiff which I upheld, on 23 April 1994 I delivered my decision dismissing the originating motion of the defendant with costs to the plaintiff. Against this decision, the defendant appeals to the Supreme Court.

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In the meanwhile, i.e. on 2 March 1994, between the date of hearing of the originating motion of the defendant and the date of the delivery of the decision in the originating motion of the defendant, the summons in chambers of the plaintiff was placed before me for disposal. This application was objected to by the defendant as this application is related to the matter in the originating motion which I heard the previous day wherein the decision was then pending. The learned counsel for the defendant applied for the stay of the application of the plaintiff pending the disposal of the matter in the originating motion. After hearing submissions by counsel from both sides, I ruled that unless and as contained in the originating motion, this summons in chambers of the plaintiff cannot be disposed off as yet. In that light I ordered a stay of the hearing of this summons in chambers pending the disposal of the originating motions of the defendant. As mentioned above, the originating motion of the defendant was disposed off on the 23 April 1994, and the appeal is now pending.

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By a letter dated 26 April 1994, the learned counsel for the plaintiff applied to the Court that in the light that the court has dismissed the defendant's application as contained in the originating motion, this summons in chambers be fixed for hearing at an early date. So, this summons in chambers comes up again before me today. Before the hearing of the summons in chambers proper, Counsel for the defendant raised an oral preliminary objection to the plaintiff's application. The substance of his objection is that when the court made an order on 2 March 1994 for this present application for payment out 'be stayed until the determination of that would mean the final determination of OM/MR.9/93. Since the case OM/MR.9/93 is now pending appeal in the Court of Appeal, learned counsel for the defendant contended that I have no jurisdiction to hear this present application **unless** the order of 2 March 1994 has been set aside or in counsel's own words 'appealed against'. Learned counsel for the defendant also submitted that s. 73 Judicature Act 1964- relating to stay of execution pending appeal does not apply to our present case as it only applies to the case OM/MR.9/93.

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As I see it the order of 2 March 1994 staying this present application was spent once the order in OM/MR.9/93 was made on 23 April 1994. The word 'determination' contained in the said order was not meant to convey the meaning of final determination by a higher court of appeal (be it Court of Appeal or Federal Court) as the stay given by me was only pending the disposal of the originating motion. On this ground the preliminary objection by the defendant's counsel was overruled.

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- a** Apart from the oral preliminary objection, the defendant also objected to the hearing of the summons in chambers of the plaintiff by way of affidavit in opposition affirmed on 19 July 1993 (End. 71B) and a supplementary affidavit in opposition affirmed on 10 May 1994 (End. 130). The substance of the defendant's objection raised in end. 71B is the impropriety of the order made by the senior assistant registrar giving directions for the sale of the defendant's land and the order of the learned Judge in reducing the reserve price of the defendant's land from RM150,000 to RM135,000 which has been dealt with by me in OM/MR.9/93 and I see no justification for raising them again in this present application in the light that a decision has been made and the matter is pending appeal and no further stay was ordered.

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- c** In the supplementary affidavit in opposition the defendant repeats the issue in his preliminary objection as well as saying that in addition to OM/MR.9/93, the defendant herein has also instituted another suit (S/MR.33/93) against the plaintiff (as 3rd defendant) for declaration that the auction sale (of which the proceeds is the subject matter of the present application) is null and void being *ultra vires* the Code and for fraud, conspiracy, collusion, breach of contract breach of agency. However, the suit has been summarily dismissed by senior assistant registrar under 0.18 r.19 of the Rules of the High Court 1980 and is currently pending appeal to Judge in Chambers. Also no
- d** order for stay was granted pending appeal. Learned counsel for the defendant insisted that since OM/MR.9/93 and S/MR.33/93 involved issues pertaining directly to are at various stages o hear this application today. There is no merit in this objection solely for the reason that in both OM/MR.9/93 and S/MR.33/93 there were no orders for stay applied for and given. Under s. 73 of the Courts of Judicature Act 1964, an appeal shall not operate as a stay of execution or of proceeding under the decision appealed from unless the court below or the Federal Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Federal Court may direct. This provision is again repeated in r. 57 of the Supreme Court Rules 1980. Since in this case, when the decision was made in regard to the motion of the defendant by the High Court, the order of 2 March 1994 is spent and since there is no further stay of the hearing of the summons in chambers of the plaintiff is granted, and both the orders are for all intents and purposes legal and valid orders, until set aside or reversed, the auction done on 12 June 1993 was also valid and the consequential proceedings under ss. 150 and 151 of the Code is proper. Under s. 150(3) of the Code, in the circumstances, the successful bidder is entitled to have the memorandum of transfer in respect of the said land of the defendant executed in his favour. As regards the summary decision of the learned senior assistant registrar dismissing the defendant's suit (S/MR.33/93) there was also no order
- e** for a stay.
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- Accordingly I hold that the several objections raised by learned counsel for the defendant have no merits. The application of the plaintiff is hereby granted with costs to the plaintiff in terms of prayers (a), for payment out of the proceeds of sale in accordance with s. 151 of the Code, and (b), for the vesting of the title to the said land in the successful bidder in accordance with s. 150 of the code. At the outset of the hearing of this application, the learned counsel for the plaintiff applied to withdraw prayer (c) which is a prayer for delivery of vacant possession and so I order that it be struck out.
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- After the delivery of the decision in chambers of the plaintiff, the learned counsel for the defendant by an oral application applied for a stay of execution of this decision pending appeal on the ground that if the stay is not granted irreparable damage would be caused to the defendant and his family. It is also contended that the matter is subjudice pending
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the two appeals mentioned earlier by the counsel. This application for stay was strenuously objected to by the learned counsel for the plaintiff on the ground that there is no special circumstances which would justify the stay.

According to *Leong Poh Shee v. Ng Kat Chong* [1966] 1 MLJ 86, although the Court has an unqualified discretion to grant a stay of execution it has never been the practice to do so unless it is supported by an affidavit of special circumstances. Being an oral application, there is no affidavit in this case. However, if I were to accept the submissions of the learned counsel for the defendant in lieu, the issue is whether the alleged irreparable damage to be caused to the defendant and his family would constitute special circumstances. In *Leong Poh Shee's* case, supra, the learned Judge at page 86 has this to say about the special circumstances, with which I agree and adopt:

Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.

The consequence upon the transfer of the land to the successful bidder which results in the loss of the title of the defendant thereby causing the inconvenience to the defendant and his family is common and usual, in the context of the meaning to be given to the phrase "special circumstances" as mentioned above: Therefore, it is nothing distinctive or out of the way and as such, in my view, would not by itself constitute special circumstances to persuade the court to stay the execution. On the issue of subjudice, for the reasons given earlier, the submissions do not appear to be attractive at all. the circumstances, the application for stay is hereby disallowed.

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